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Federalism in Canada

Honourable John D. Richard¹

INTRODUCTION

Today, I would like to provide an overview of Canadian federalism: the historical circumstances which gave rise to it, the evolution of the Constitution on which it is based, and the way it has both shaped and protected certain fundamental aspects of contemporary Canadian society, namely, bilingualism, bijuralism, multiculturalism, and a respect for human rights. Before I examine the past, however, a brief description of present-day Canada is in order.

Originally a union of four provinces, Canada is now composed of ten provinces and three territories. Canada became a federation in 1867, which makes it the third oldest federation in the world today, after the United States and Switzerland.² While the term “confederation” is often used by Canadians when referring to the union of 1867, the term actually refers to the process of bringing the provinces together into a federation, rather than the adoption of a confederal structure.

Federalism in Canada is a reflection of its unique geography and history. It is a large country, second only to Russia in territorial size,³ but it has a relatively small population of approximately thirty-two million people. The composition of that population has also changed since confederation. In 1867, Canada was primarily a mix of English and French colonists. The first settlers from France arrived in 1604. Today, the Canadian population includes individuals from virtually every country in the world. Notwithstanding this, a French-speaking majority has endured within one province: Quebec. About eighty percent of the French Canadian

1. Chief Justice, Federal Court of Appeal, Ottawa-Canada. I wish to acknowledge the thorough research assistance of my law clerk, JoAnne Lagendyk, in the preparation of this paper as well as the contribution of my former law clerk, Melanie Mallet.

2. RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 3 (McGill-Queen's University Press 2nd ed. 1999). (The U.S. transformed its confederation into a federation in 1789, as did Switzerland in 1848).

3. *Id.* at 23.

population lives in Quebec, where they constitute over eighty percent of the population.⁴

A federal system reconciles a desire for overall unity with a desire for regional autonomy.⁵ A country with a federal system has independent national and regional governments, each operating, theoretically at least, in its own discrete jurisdictional area.⁶ Such is the case in Canada. Political power is shared by two orders of government: the federal government on the one hand, and the provincial governments on the other. Within their defined spheres of jurisdiction, the two orders are equal; there is no superior-subordinate relationship. The distinct functions of the provincial legislatures and of the Parliament of Canada were established in the *British North America Act*, which was later renamed the *Constitution Act, 1867*.

Like both the United States and the United Kingdom, Canada has a bicameral legislature which is composed of the House of Commons and the Senate. However, the Canadian Senate bears more resemblance to the United Kingdom's House of Lords than it does the United States Senate. Its members are appointed,⁷ rather than elected, and it is dominated by the House of Commons. In addition, rather than each province having an equal number of Senators, as in the United States model, the Canadian Constitution specifies the number of Senators that are to come from each province.⁸ In Canada, Senate representation is based on regions instead of constituent units. This was done to ensure that Canada's linguistic minority, concentrated primarily in Quebec, was adequately represented.

Canada has a parliamentary system, like the United Kingdom, rather than a congressional one, like the United States. This means that, in Canada, the executive functions are divided between a formal executive (the Governor General) and a political executive (the Prime Minister and his cabinet).

4. WATTS, *supra* note 2, at 24.

5. RICHARD J. VAN LOON & MICHAEL S. WHITTINGTON, *THE CANADIAN POLITICAL SYSTEM: ENVIRONMENT, STRUCTURE AND PROCESS* 188 (McGraw-Hill Ryerson 4th ed. 1987).

6. *Id.*

7. CAN. CONST. (CONSTITUTION ACT, 1867), pt. IV, reprinted in R.S.C. 1985, App. II, No.5, § 5.

8. CAN. CONST. (CONSTITUTION ACT, 1867), pt. IV. The Senate usually has 105 members: 24 from the Maritime provinces (10 from Nova Scotia, 10 from New Brunswick, four from Prince Edward Island); 24 from Quebec; 24 from Ontario; 24 from the Western provinces (six (6) each from Manitoba, Saskatchewan, Alberta and British Columbia); six (6) from Newfoundland and Labrador; and one (1) each from the Yukon Territory, the Northwest Territories and Nunavut.

In a congressional system, the President acts as Chief of State, Head of Government, and leader of a major political party. In contrast, the Prime Minister is not Canada's Chief of State; this function is entrusted to the Governor General.⁹ Formal executive power in Canada is vested in the Crown, and in a formal sense, Canada has a monarchic form of government.

But while the Governor General theoretically exercises all of the rights and privileges of the Queen in right of Canada,¹⁰ the real power is actually exercised by the Prime Minister and his cabinet. Executive decisions made by the Prime Minister and his cabinet are, in effect, rubber stamped by the Governor General. In fact, it is a well established convention that the Governor General acts only on the advice of the government of the day.

Another difference between congressional and parliamentary systems is that a congressional government is based on a separation of powers while a parliamentary government is based on a concentration of powers. The American President and his cabinet cannot be members of either House of Congress. Nor can the President or any member of his cabinet appear in Congress to introduce a bill, answer questions, or rebut attacks on policies.¹¹

On the other hand, the Prime Minister and every other Minister is, by custom, a member of either one House or the other. Government bills must be introduced by a Minister or someone speaking on his behalf, and Ministers must appear in Parliament to defend government bills and answer daily questions on government actions or policies.¹² A parliamentary system is based on the principle of fusion of executive and legislative powers. Whichever party has a majority of seats in the legislature also controls the executive branch, thus the same political leaders operate both the executive and legislative branches of government. This bridge between the legislative and executive parts of the government is the cabinet, which is collectively responsible to the legislature for its actions and retains office only so long as it receives majority support in the legislature.¹³

9. CAN. CONST. (CONSTITUTION ACT, 1867), pt. IV.

10. *Id.*

11. EUGENE A. FORSEY, HOW CANADIANS GOVERN THEMSELVES 26 (Library of Parliament 5th ed. 2003).

12. *Id.*

13. RONALD G. LANDES, THE CANADIAN POLITY, A COMPARATIVE INTRODUCTION 24 (Prentice Hall Canada 4th ed. 1995).

While a parliamentary system is marked by this fusion of powers, a congressional system, on the other hand, is characterized by a separation of powers — each branch of government acts independently from the others. This separation is maintained through a series of checks and balances, specific constitutional powers granted to each branch to control certain aspects of the operation of the other branches of government. For example, the President may veto a law that was passed by the legislature. For its part, the legislature is given a countercheck that enables it to override a presidential veto by a two-thirds vote in both Houses.¹⁴

The government of the Canadian provinces mirrors that of the national government. At the provincial level, the executive is split between a Premier and a Lieutenant-Governor. However, the provinces are no longer bicameral. They have all abolished their Senates.

Canada is, of course, a democratic state. The relationship between democracy and federalism means that, in Canada, there may be different and equally legitimate majorities in different provinces and territories as well as at the federal level. No one majority is more or less “legitimate” than the others as an expression of democratic opinion. Different provinces are able to pursue specific policies that respond to the particular concerns of the people in that province. At the same time, federalism allows Canadians to achieve their goals on a national scale through a federal government acting within the limits of its jurisdiction. Canadian federalism enables citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.¹⁵

ORIGINS OF CANADIAN FEDERALISM

In order to appreciate contemporary Canadian federalism, it is necessary to have an understanding of the forces that shaped it. Canadian federalism was a political and legal response to the underlying social and political realities of British North America in the mid-nineteenth century.

In 1860, British North America was made up of the colonies of Newfoundland, Nova Scotia, New Brunswick, and Prince Edward Island on the Atlantic coast, each one separate and having very

14. *Id.* at 25.

15. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at paragraph 66.

little to do with the others. On the Pacific coast were Vancouver Island and British Columbia. In the center was the large United Province of Canada, which consisted of the French-Catholic dominated Lower Canada and the English-Protestant dominated Upper Canada. Although the colonies were geographically, politically, and economically separate from one other, they were all closely tied to Britain.¹⁶ In 1841, the formerly separate colonies of Lower and Upper Canada were forced by Britain into an involuntary and largely unhappy political union. Although Lower Canada had a much larger population than Upper Canada, the two provinces were given the same number of elected representatives, a situation the French Canadians in Lower Canada resented.¹⁷

In addition to pressures within the colonies, there were threats from the United States to the south. First, there was the danger of the Fenians, an Irish Catholic group that hoped to free Ireland by attacking British colonies in North America. In 1866, 1,500 Fenians were repelled when they invaded Upper Canada.¹⁸

Then there was the threat of annexation by the United States, which had already invaded unsuccessfully twice: once in 1775, when an American army had invaded Quebec and captured Montreal,¹⁹ and again in 1812, when the Americans had invaded the Niagara region of Ontario.²⁰

British public opinion had been in favor of reducing, if not eliminating government spending in North America, especially for defense, and it appeared that the colonies might be left to fend for themselves in the case of another attack.²¹

Thus, it was in 1864, motivated by a desire to create mutual commercial ties and by the threat of annexation by the United

16. CBC, *Canada, A People's History: The Great Enterprise: Pre-Confederation British North America*, http://history.cbc.ca/history/?MIval=EpContent.html&episode_id=8&series_id=1&lang=E&chapter_id=1 (*A People's History*).

17. CBC, *Canada, A People's History: The Great Enterprise: Pre-Confederation British North America*, http://history.cbc.ca/history/?MIval=EpContent.html&episode_id=8&series_id=1&lang=E&chapter_id=1.

18. CBC, *Canada, A People's History: The Great Enterprise: The Fenians*, http://history.cbc.ca/history/?MIval=EpContent.html&series_id=1&episode_id=8&chapter_id=2&page_id=3&lan=E.

19. MASON WADE, *THE FRENCH CANADIANS, 1760-1945*, 69-70 (1956).

20. PIERRE BERTON, *THE INVASION OF CANADA* 100 (1980).

21. CBC, *Canada, A People's History, The Great Enterprise: The Charlottetown Conference*, http://history.cbc.ca/history/?MIval=EpContent.html&series_id=1&episode_id=8&chapter_id=4&page_id=1&lang=E.

States, that representatives of the Atlantic provinces and the province of Canada met in Charlottetown, Prince Edward Island, to consider a union of British North America.

Several models were discussed. While there was a good deal of support for a unitary model, there was also a good deal of resistance. In particular, while Quebec wished to share in the development of the continent as well as to gain access to the markets of the other provinces, it refused to accept the minority position that would have been its lot in a unitary state. Such a position would have been unacceptable to the people of Quebec, who took pride in their separateness and wished to preserve their faith, their language, their laws, and their culture. They believed that a federal union, which recognized and supported the autonomy of each constituent unit, would best preserve their distinctiveness.²²

Therefore, after much discussion, the representatives decided to adopt a federal model for their union, believing that a federation would protect the interests of its members while allowing them to reap the benefits of a larger political unit. Not all provinces believed that a federation was the best solution. Prince Edward Island and Newfoundland were not convinced that a federation would allow them to preserve their cultural distinctiveness. For this reason, they did not join the federation until later: Prince Edward Island in 1873, and Newfoundland in 1949.²³

The federation that was ultimately adopted was a legal recognition of the diversity that existed among the initial members of Confederation. By granting significant powers to the provincial governments, diversity was accommodated within the framework of a single nation. For British North America, "federalism was the political mechanism by which diversity could be reconciled with unity."²⁴

Having decided on a federal union, the representatives met again a month later in Quebec City to work out the details, most significantly the orientation of the federation: Should it have a strong or weak central authority? There were proponents for both sides. The representative from New Brunswick argued that taking away powers from the provinces would turn them into mere

22. Marianopolis College, *Readings in Quebec History: Federalism*, <http://www2.marianopolis.edu/quebechistory/readings/federal.htm>.

23. Errol P. Mendes, *Shorter Commentaries: The Canadian Constitution and Charter of Rights and Freedoms: A Global Template for Democratic Pluralism*, 21 Windsor Y.B. Access. Just. 543, 546 (2002).

24. *Secession Reference*, *supra* note 15, at paragraph 43.

municipal corporations.²⁵ Proponents of a strong central power looked to the United States, which was in the midst of a civil war, and blamed what they saw as “federal-state tensions run amuck”²⁶ on that federation’s weak central authority. Hoping to avoid a similar fate, they wished to orient their union around the center.

Sir John A. Macdonald, conservative leader in Upper Canada and subsequently Prime Minister of Canada for most of the next twenty-five years, believed that the primary error of the United States was that, at the formation of its Constitution, each state reserved to itself all sovereign rights, except for the small portion that was delegated to the central authority. Macdonald felt that this process had to be reversed and the central government strengthened by conferring on the provinces only those powers that were required for local purposes.²⁷ Macdonald also believed that only a strongly united Canada could guarantee protection from another military attack by the United States.²⁸

CONSTITUTION ACT, 1867

After much spirited debate on the merits of both versions of federalism, Macdonald and his supporters ultimately prevailed. The Constitution that came into being on July 1, 1867, established a federation that was highly centralized. For example, the federal government was granted unlimited taxing powers, while the provinces were limited to direct taxes within the province. In addition, the federal government could assume jurisdiction over any local work or undertaking, even if located wholly within a province, by declaring it to be for the general advantage of Canada and thus under its legislative jurisdiction. Furthermore, the federal government was given the ability, under certain circumstances, to overrule provincially-enacted legislation.

Not only was the federal government granted more exclusive powers than were held in the already-existing federations of the United States and Switzerland, but residual powers were also given to the federal government through its general power over “peace, order and good government,” in contrast to the Swiss,

25. William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 Wash. L. Rev. 585, 603 (1985).

26. *Id.* at 600.

27. *Id.* at 602.

28. *Id.* at 603.

American, and later, Australian models, in which residual powers were assigned to the states or cantons.²⁹

The federal government was further strengthened by the fact that Senators were appointed for life by the Governor General in council, which, as we saw earlier, was in reality the federal government. In contrast, in 1867, United States Senators were appointed by the state legislatures to represent state interests within the federal legislature. While United States Senators are now elected directly by the people of the state, Canadian Senators are still appointed by the federal government.

The federal government was also given the authority to establish a general court of appeal for Canada and to name judges to its bench. The government exercised this power in 1875 when it created the Supreme Court of Canada, which is now the final referee of constitutional disputes between the federal and provincial governments,³⁰ having reclaimed this role from the Privy Council in 1949. The Canadian Parliament was also empowered to appoint all provincial judges, from the district level all the way up to the appellate level, and was responsible for judicial salaries, allowances, and pensions.

The Constitution embodied a compromise under which the original provinces agreed to federate. Preservation of the rights of minorities was a condition on which such minorities entered into the federation and the foundation upon which the whole structure was subsequently erected.³¹

The Constitution that delineated the federal-provincial division of powers was called the *British North America Act, 1867*. Later renamed the *Constitution Act, 1867*, it created the Dominion of Canada by uniting the provinces of Canada East, Canada West, Nova Scotia, and New Brunswick. It also provided the framework for the admission of other parts of British North America and established the division of legislative powers between the Federal Parliament and the provincial legislatures. The Constitution bound both orders of government, as well as the executive branch.

Unlike the American Constitution of 1787 and its amendments, the bulk of Canadian constitutional law is not contained in a sin-

29. Government of Canada, Privy Council Office, *The Constitutional File and the Unity File: The History of Canada's Constitutional Development*, <http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=Home> [hereinafter *The Constitutional File*].

30. *Id.*

31. Hodge, *supra* note 25, at 617.

gle document. Subsection 52(2) of the *Constitution Act, 1982* includes a non-exhaustive list of the twenty-five constitutional texts that make up Canada's Constitution. However, a large part of Canada's Constitution, and some would say the most fundamental parts of it, consist of unwritten principles which have infused and shaped it. They are known as constitutional conventions.

CONSTITUTIONAL CONVENTIONS

Constitutional conventions have been described as "rules of political behaviour that are regarded by political actors as binding on them but are not enforced directly by the courts"³² or as "rules of behaviour that *ought* to be regarded as binding."³³ Or, as the Supreme Court of Canada has succinctly put it: "[C]onstitutional conventions plus constitutional law equal the total constitution of the country."³⁴

The Prime Minister and the cabinet are not mentioned in the *Constitution Act, 1867*. Neither is the assumption that a Cabinet Minister will hold a seat in the House of Commons. The practice that the defeat of a major piece of government legislation is also a defeat of the government is not specified in any document.³⁵ These are all basic features of Canada's government, yet none of them are to be found in the written Constitution.³⁶ They are constitutional conventions.

Conventions are the fundamental but unwritten principles that provide the underpinnings of our Constitution: federalism, democracy, constitutionalism and the rule of law, respect for minority rights,³⁷ and judicial independence.³⁸ Earlier this year, the Supreme Court suggested that another fundamental unwritten principle be recognized: the respect for human rights and freedoms.³⁹ These underlying principles "infuse our Constitution and breathe life into it."⁴⁰ They are essential to the ongoing process of constitu-

32. PATRICK J. MONAHAN, *CONSTITUTIONAL LAW* 7 (2d ed. 2002).

33. GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* (1984) (cited in ANDREW HEARD, *CANADIAN CONSTITUTIONAL CONVENTIONS — THE MARRIAGE OF LAW AND POLITICS* (1991)).

34. *Patriation Reference Case*, [1981] 1 S.C.R. 753.

35. LANDES, *supra* note 13, at 79.

36. FORSEY, *supra* note 11, at 10.

37. *Secession Reference*, *supra* note 15, at paragraph 32.

38. *R. v. Demers*, [2004] S.C.C. 46, [2004] S.C.J. No. 43 at paragraph 83.

39. *Id.*

40. *Secession Reference*, *supra* note 15, at paragraph 50.

tional development and evolution of our Constitution as a "living tree."⁴¹

These unwritten elements make up a "global system of rules and principles which govern the exercise of constitutional authority in the whole and every part of the Canadian state."⁴² They are a "matrix of values" that infuse

the totality of our constitutional documents. No one part of the Constitution can be read in isolation from another, nor does any one principle of our Constitution trump another. These unwritten elements are aids in the interpretation of the text of our constitutional documents and can fill gaps in the text.⁴³

These unwritten principles also help determine spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Most importantly, they permit our written Constitution to remain flexible and progressive without the need to invoke the formal and difficult process of constitutional amendment. As former Chief Justice Dickson of the Supreme Court said:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power. . . . Once enacted, its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.⁴⁴

Constitutional conventions are crucial to the continuing vitality and relevance of our Constitution. They give the Constitution the flexibility to adapt to meet the needs of Canadian society as it grows and matures.

41. *Id.* at paragraph 52.

42. *Id.* at paragraph 32.

43. *Demers*, *supra* note 38, at paragraph 83.

44. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

Indeed, the Constitution has been compared to “a living tree capable of growth and expansion within its natural limits.”⁴⁵ Lord Sankey, speaking for the Judicial Committee of the Privy Council, stated that the Canadian Constitution was subject to development through usage and convention. Its provisions were not to be cut down by a narrow and technical construction but rather to be given “a large and liberal interpretation.”

A written constitution requires a flexible and progressive interpretation since it is likely to remain in force for a long time and is difficult to amend. I might add that this requirement also applies to a Charter of Rights.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The *Constitution Act, 1867* did not contain an amending provision. Therefore, whenever Canada wished to amend its Constitution, it had to ask the British Parliament to do so. This situation changed in 1982, when the Canadian Constitution was “repatriated” by the addition of an amending clause, which permitted Canadians to amend their own Constitution without external help. The 1982 amendment of the Constitution also included the addition of a Charter of Rights and Freedoms.

The Charter is a very significant document. Its preamble states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law” and sets out those rights and freedoms which are guaranteed. Section Two protects fundamental freedoms, including freedom of conscience and religion; freedom of thought, belief, opinion, and expression; freedom of peaceful assembly; and freedom of association. Sections Three, Four, and Five protect democratic rights such as the right to vote in an election, the maximum duration of legislative bodies without an election, and the annual sitting of legislative bodies. Mobility Rights, which include the right of citizens to enter, remain in, and leave Canada, and the right to move and gain livelihood are covered in Section Six.

Sections Seven to Fourteen concern legal rights, including the right to life, liberty, and security of the person; protection from unreasonable search and seizure; protection from arbitrary detention or imprisonment; specific rights upon arrest or detention;

45. *Persons Case*, [1930] 1 D.L.R. 98 (citing SIR ROBERT LAIRD BORDEN, *CANADIAN CONSTITUTIONAL STUDIES* 55 (1922)).

freedom from cruel and unusual treatment or punishment; freedom from self-incrimination; the right to the assistance of an interpreter; and rights upon being charged with an offence.

The rights to equality before and under the law, and to equal protection and benefit of the law are protected by Section Fifteen. The goal of Section Fifteen is to protect human dignity and has been invoked in a wide range of cases that have one common thread: the protection of equal membership and full participation in Canadian society. Section Fifteen has been invoked to protect the right of off-reserve aboriginal band members to participate in band governance; to redress the harm done by excluding disabled individuals from the larger society; and to include the ground of sexual orientation in a human rights statute that prohibited discrimination on other grounds.⁴⁶

Sections Sixteen to Twenty-Two protect the rights to speak and conduct affairs in either of Canada's official languages, while Section Twenty-Three entrenches linguistic education rights of French-speaking minorities outside Quebec and English-speaking minorities within Quebec.

Section Twenty-Five specifies that the Charter's guarantee of certain rights and freedoms does not abrogate or derogate from any right or treaty pertaining to Canada's aboriginal peoples, and Section Twenty-Six specifies that the Charter does not deny the existence of any other rights or freedoms that already exist in Canada.

Section Twenty-Seven directs that the Charter is to be interpreted in a way that preserves and enhances the multicultural heritage of Canada, while Section Twenty-Eight guarantees that the rights and freedoms apply equally to both sexes.

The fundamental, legal, and equality rights in the Charter are subject to an override clause. Section Thirty-Three allows both federal and provincial legislatures to declare that a statute shall operate notwithstanding those sections of the Charter for a period of five years. Sections Three to Six (democratic and mobility rights) and Sixteen to Thirty-Two (official languages and minority language education) are exempt from the application of the "notwithstanding" clause.

This override is not subject to judicial review and may be renewed after the first five year period has expired. In the past

46. *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paragraph 23 (citations omitted).

twenty years, the notwithstanding clause has rarely been used, and only by provincial governments. Only three provinces have invoked it, and, given the political fall-out that can often accompany its use, it is unlikely to be employed frequently in the future.⁴⁷

The Charter "signalled an evolution in our constitutional and political culture."⁴⁸ But a respect for individual rights has always been a part of Canada's Constitution. By deliberately adopting a Constitution in 1867 that was similar in principle to that of the United Kingdom,⁴⁹ Canada also chose to incorporate the principles of civil liberties and human rights that were embedded in English constitutional history.⁵⁰ This history includes the Magna Carta, the Bill of Rights of 1689, the Balfour Declaration of 1926, and the Statute of Westminster of 1931. Canada itself added to this list with its own Bill of Rights, enacted in 1960.

The 1982 promulgation of the Charter can be seen as a continuation of the evolution of Canada's political and constitutional culture. The Charter was not only Canada's affirmation of its own distinct political culture, separate from that of the United Kingdom, but also the expression of its own spirit of human rights.⁵¹

While the Charter was inspired in part by the United States Bill of Rights, it is by no means a completely analogous document. The Charter has a uniqueness which flows "not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social, and political tradition."⁵²

The drafters of the Charter were influenced by international instruments, such as the *International Covenant on Civil and Political Rights*,⁵³ the United Nations *Universal Declaration of Human Rights*,⁵⁴ and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁵⁵

Consequently, when interpreting the Charter, Canadian courts make reference to these international human rights instruments.

47. MONAHAN, *supra* note 32, at 422-23.

48. Demers, *supra* note 38, at paragraph 79.

49. Secession Reference, *supra* note 15, at paragraphs 43-44.

50. Demers, *supra* note 38, at paragraph 82.

51. *Id.* at paragraph 83.

52. Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211 at paragraph 81.

53. G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

54. G.A. Res. 217 A, U.N. Doc. A/8106 (1948).

55. Nov. 4, 1950, 213 U.N.T.S. 222.

For example, the Supreme Court's analysis of Section Seven of the Charter in the 2002 case of *Suresh v. Canada (Minister of Citizenship and Immigration)*⁵⁶ draws on a number of international perspectives on torture, citing a wide range of international treaties and charters, including instruments that Canada is incapable of ratifying, such as the *African Charter on Human and Peoples' Rights*.⁵⁷ The Court acknowledged that even though international treaty norms are not, strictly speaking, binding in Canada, these norms may nonetheless assist the Court in its interpretation of the Charter by acting as evidence of international acceptance of certain principles of fundamental justice.⁵⁸

When interpreting the Charter, in addition to international human rights instruments, Canadian courts also take notice of American jurisprudence. However, the Supreme Court has adopted a cautious attitude towards adopting American constitutional interpretation, despite acknowledging that, with over 200 years of experience in constitutional interpretation, American courts may be able to offer some guidance to the judiciary in this area.⁵⁹

CONSTITUTIONAL VS. PARLIAMENTARY SUPREMACY

The Charter is recognized by our courts as the supreme law of Canada. Subsection 52(1) of the *Constitution Act, 1982* stipulates that any provincial or federal law which is inconsistent with the Charter is, to the extent of the inconsistency, of no force and effect. In contrast, the American Bill of Rights applies only to federal legislation as an aid to interpretation.

Prior to 1982, parliamentary supremacy reigned in Canada. The *Constitution Act, 1867* set the division of powers between Parliament and the provincial legislatures. Each legislature was supreme such that, within its jurisdiction, no other institution had the power to declare its laws unconstitutional.

This situation changed in 1982 when the Charter of Rights and Freedoms was adopted as part of the *Constitution Act, 1982*. Essentially, Canada ceased to be a country of parliamentary supremacy and became, like the United States, a country of constitutional supremacy, where the Charter is "the supreme law of Can-

56. [2002] 1 S.C.R. 3 at paragraph 46.

57. (1981), 21 I.L.M. 58, Article 5.

58. *Suresh*, *supra* note 56, at paragraph 60.

59. *R. v. Simmons*, [1988] 2 S.C.R. 495 at paragraph 26.

ada.” As of 1982, if Parliament or any of the provincial legislatures enacts a law that violates a section of the Charter, a court has the power under Section 52(1) of the *Constitution Act, 1982* to strike this legislation down.

The power of the courts to declare a law to be contrary to the Charter is in addition to their power of judicial review to enforce the distribution of powers under the rules of federalism contained in the *Constitution Act, 1867*.

In addition to the existing remedies for unconstitutional action, the Charter contains its own remedy clause. This general remedial provision is found in Subsection 24(1) which specifies that anyone whose Charter rights or freedoms have been breached may apply to a court of competent jurisdiction for a remedy. The court has the discretion to award such remedy as it considers “appropriate and just in the circumstances.” This provision authorizes a wide range of judicial remedies including the discretion to decide that no remedy should be awarded.

JUSTIFIED LIMITATIONS OF GUARANTEED RIGHTS

The Canadian Supreme Court has stated that the rights and freedoms guaranteed by the Charter are to be accorded a “generous and expansive” interpretation.⁶⁰

The need for a generous interpretation flows from the principle that the Charter ought to be interpreted purposively. While courts must be careful not to overshoot the actual purposes of the Charter’s guarantees, they must avoid a narrow, technical approach to Charter interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the Charter.⁶¹

However, the Supreme Court has also noted that the guaranteed “rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights.”⁶² In effect, the rights and freedoms guaranteed by the Charter are subject to such reasonable limits as can be justified in a free and democratic society.

Both the guarantee of the rights and the limitations on them are contained in the same section, the first section of the Charter,

60. Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3 at paragraph 23.

61. *Id.*

62. Vriend v. Alberta, [1998] 1 S.C.R. 493 at paragraph 131 (Iacobucci, J.).

which reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section One sends a clear message to the courts that Charter rights and freedoms are not absolute and that, on occasion, it is both appropriate and necessary to limit these rights in order to protect the interests of Canadian society as a whole. The placement of the limitations clause is an indication of the primacy of this concern: the limitations clause actually precedes the enumeration of individual rights.⁶³

Accordingly, when Parliament enacts a law that limits a right or freedom guaranteed under the Charter, that limitation must be justified under Section One. The Supreme Court of Canada has prescribed a single standard of justification and cast the burden of satisfying it on the government.

Section One imposes a two-stage justification process on the government: Does the challenged law have the effect of limiting one of the guaranteed rights, and if so, is that limit a reasonable one that can be demonstrably justified in a free and democratic society? This two-stage process is similar to the review process in the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*.

To justify the limitation of a right, the government must satisfy the court that the law has a sufficiently important objective, that the law is rationally connected to this objective, that the law impairs the right no more than is necessary to accomplish this objective, and that the effects of the law are proportionate to the importance of this objective.

This test was first formulated in the criminal case of *R. v. Oakes*⁶⁴ in 1986 and has been applied consistently by the courts ever since. The *Oakes* test was set out in its classic form in a recent decision of the Supreme Court of Canada as follows:

The analysis under s. 1 determines whether the means chosen to fulfill a legislative objective constitutes a reasonable limit on a *Charter* right in a free and democratic society. Pursuant to the well-established *Oakes* test, this analysis consists of two broad inquiries: the first inquir-

63. MONAHAN, *supra* note 32 at ch. 13.

64. [1986] 1 S.C.R. 103.

ies into whether the objective is sufficiently pressing and substantial, and the second examines the proportionality between the objective sought and the means chosen.⁶⁵

Chief Justice Dickson added that the Court had to be guided by the values and principles essential to a free and democratic society, which included “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁶⁶

Section One of the Charter permits the courts to balance the good of the individual with the good of society as a whole. The words “free and democratic society” included in Section One are crucial. The inclusion of these words as the “final standard of justification for limits on rights and freedoms”⁶⁷ refers courts to the reason that the Charter was entrenched in the Constitution: to ensure that Canadian society remains free and democratic.

BIJURALISM AND BICAMERALISM

Canada is one of the few countries in the world that operates under both the common law and the civil law. Canada also enacts legislation in its two official languages, English and French. This combined duality has had a significant impact on Canada’s brand of federalism, which has been shaped, and continues to be shaped, by the related concepts of bijuralism and bilingualism.

BIJURALISM

Bijuralism refers to the existence of two legal systems within a single country.⁶⁸ While nearly one hundred countries are governed by a combination of two or more legal systems, only fifteen combine the civil law and the common law.⁶⁹ Rarer still is this combi-

65. Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76 at paragraph 233 (citing R. v. Oakes, [1986] 1 S.C.R. 103, at 138-39).

66. Oakes, *supra* note 64, at 136.

67. *Id.*

68. Alain Vauclair & Lyne Tassé, *Civil Law and Common Law Balanced on the Scales of Thémis: The Example of the Bankruptcy and Insolvency Act*, 37 R.J.T. 5 (2003) [hereinafter *Civil Law and Common Law*].

69. *World Legal Systems* (1998) online: University of Ottawa,

nation occurring in one federal national legal order, such as Canada's.⁷⁰ While Canada may not be the only bijural jurisdiction in the world, it is the only G-8 nation where bijuralism is being achieved through a formal program organized by the national government.⁷¹

The origins of Canada's legal duality date back more than two centuries. Up until the British Conquest of 1760, the main source of law in New France had been the *Coutume de Paris*. After the Conquest, the British introduced the common law and equity. However, local attachment to French private law led the British Parliament to pass the *Quebec Act* in 1774, which restored French laws and customs, with the exception of criminal and penal matters.⁷²

Canada's two legal systems were officially entrenched in the *Constitution Act, 1867* under Subsection 92(13) which provided for exclusive provincial jurisdiction over property and civil rights. Due to this provision, the province of Quebec has been able to make the *Civil Code of Quebec* the framework of its private law, while the rest of Canada is governed by the common law. The duality of Canada's legal system is also reflected in the composition of the Supreme Court of Canada: under the *Supreme Court Act*, three of its nine judges must be chosen from Quebec.

When combined with bilingualism, bijuralism presents a major challenge to the legislative drafter. In effect, the legislator is drafting for four audiences: civil law Francophones, common law Francophones, civil law Anglophones, and common law Anglophones.⁷³ To respond to this need, in 1995, Canada's Justice Department adopted the *Policy on Legislative Bijuralism*, which recognized the need to find terminology and wording that respected the concepts, notions, and institutions proper to each of the four audiences in the context of federal statutes and regulations.

In 1999, the *Program for the Harmonization of Federal Legislation with the Civil Law of Quebec* was launched. This harmoniza-

www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.html. Mixed jurisdictions of common law and civil law include Louisiana, Quebec, St. Lucia, Puerto Rico, South Africa, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka, and Scotland.

70. *Civil Law and Common Law*, *supra* note 68, at 8.

71. Mario Dion, *Preface Bijuralism and Harmonization: Genesis*, Department of Justice, *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, <http://canada.justice.gc.ca/en/dept/pub/hfl/table.html>.

72. *Civil Law and Common Law*, *supra* note 68.

73. *Civil Law and Common Law*, *supra* note 68, at 8.

tion involved reviewing all federal statutes and regulations whose application relied on provincial private law and then harmonizing their contents to incorporate the notions and vocabulary of Quebec civil law.⁷⁴ In June 2001, the *Federal Law-Civil Law Harmonization Act, No. 1* came into force, partially harmonizing nearly 50 statutes at once.⁷⁵

Bijural states such as Canada provide valuable examples of the way in which legal systems can co-exist in harmony. As noted by former Supreme Court Justice, the Honourable Claire L'Heureux-Dubé, bijural jurisdictions "exemplify the very same elements of convergence and cross-pollination that we see taking place in the global arena when transnational legal encounters occur, especially those in commercial law, with NAFTA and the EU as prime examples."⁷⁶

In Canada today, official legal culture is neither French nor English, neither civil law nor common law; instead, it is all these together, with all the ambiguity that such complexity implies.⁷⁷

BILINGUALISM

In Canada, Anglophones represent about seventy-five percent of the population, with Francophones accounting for the remaining quarter. The majority of Francophones are concentrated in the province of Quebec, although more than one million Francophones make their homes in other provinces, especially New Brunswick, Ontario, and Manitoba.

Parliament is required by Section 133 of the *Constitution Act, 1867* to use both English and French in its proceedings and publications. Any member of the public therefore has a constitutional right to communicate with and receive services from any institution of the Parliament or government of Canada in English or in French. The equal status of French and English was recognized in 1982 by Section Eighteen of the Charter, which provides that both language versions of statutes are equally authoritative.

These constitutional provisions require Canada to enact legislation in French and English at the federal level, and, in some cases,

74. *Id.*

75. *Id.* at 10.

76. The Honourable Claire L'Heureux-Dubé, *Bijuralism, A Supreme Court of Canada Justice's Perspective*, 62 La. L. Rev. 449, 450 (2002).

77. *Id.* at 454.

at the provincial level as well.⁷⁸ Canada is not unique in this regard. Several other countries legislate in two or more languages. Ireland, for example, enacts legislation in Irish and English, Wales in Welsh and English, Hong Kong in Chinese and English,⁷⁹ while Switzerland legislates in three languages (German, French, and Italian).⁸⁰

In some bilingual jurisdictions, such as Ireland and South Africa, the constitution or a statute, provides that one language version takes precedence over the other. In other jurisdictions, such as Hong Kong and Wales, both language versions are equally authentic.⁸¹ Canada has an "equal authenticity rule" — both the English and French versions of a statute have equal authority.⁸² Statutory interpretation in Canada therefore requires reading the two texts in light of one another, a practice which has the potential to provide added insight to legislative intention.

When the two versions of the statute contradict each other, as will inevitably happen from time to time, legislative drafters being only human, after all, courts employ the "shared meaning rule" to determine which meaning should prevail. Where there is an overlap in the meaning between the two language versions that are otherwise at variance, the meaning that is shared by both versions is the one to be used, unless it is for some reason unacceptable.⁸³

The adoption of statutes in both languages enhances the clarity of legal drafting. Bilingual drafting and legal translation frequently highlight ambiguities in the first language, allowing revisions to be made before final adoption of the statute. Two versions of a statute can also be of great assistance when a court is asked to interpret its terms "because there is then an additional tool to determine the true legislative intent."⁸⁴

78. The Northwest Territories, Yukon, and Nunavut are subject to the same requirements as the federal government; Quebec is required by the *Constitution Act, 1867*, s. 133; Manitoba by the *Manitoba Act, 1870*, 33 Vict., c. 3, s. 23, reprinted in R.S.C. 1985, App. II, No. 8; New Brunswick by the *Constitution Act, 1982*, s. 16(2); Ontario by *French Language Services Act*, R.S.O. 1990, c. F-32, s.3.

79. Law Drafting Division, Hong Kong Department of Justice, Legislative Drafting in Hong Kong: Crystallization in Definitive Form, 2nd ed., online: <http://www.justice.gov.hk/ldhkv2e.pdf> at 6.2.

80. Paul Salembier, *Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule* 35:1 Ottawa Law Rev. 77 (2003).

81. *Id.* at 78.

82. L'Heureux-Dubé, *supra* note 76, at 452.

83. Salembier, *supra* note 80, at 80-81.

84. Andrew Gray & Eleni Yiannakis, *Language, Culture and Interpretation: An Interview with Mr. Justice Michel Bastarache*, 58 U.T. Fac. L. Rev. 73, 80 (2000).

The *Official Languages Act*,⁸⁵ adopted first in 1969 and amended in 1988, is a legislative measure taken to fulfil the constitutional obligation of governmental bilingualism in Canada. The Act's preamble underlines the equal status of English and French in institutions of the Parliament and government of Canada as well as the guarantee of full and equal access in both languages to Parliament, to the laws of Canada, and to the courts.⁸⁶

The objectives of the *Official Languages Act* include ensuring respect, equality of status, and equal rights regarding the use of English and French as the official languages of Canada, particularly with respect to their use in parliamentary proceedings, legislation, administration of justice, and in the work of federal institutions. In addition, the Act supports the development of English and French linguistic minority communities and promotes the equality of status and use of both languages within Canadian society.

In fact, the objectives and values embodied in the *Official Languages Act* have given it a special place in the Canadian legal framework. This status was recognized by the Federal Court of Appeal in 1991 when it held that the Act was not an ordinary statute, but rather one that belonged to the privileged category of quasi-constitutional legislation which reflected "certain basic goals of our society." Due to its status, the Act must be interpreted "as to advance the broad policy considerations underlying it."⁸⁷

Over a decade later, in 2002, the Supreme Court confirmed the Act's quasi-constitutional status, a status justified by its constitutional roots and its crucial role in relation to bilingualism.⁸⁸

The legislative protection given to language rights is essential to their preservation. Language rights cannot exist in a vacuum. As Justice Bastarache of the Supreme Court said, "The freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees."⁸⁹ The goal of the *Official Languages Act* is to ensure that all Canadians enjoy the ability to exercise their linguistic choice.

The Supreme Court demonstrated its commitment to bilingual legal practice in Canada, most notably in its 1985 decision in *Re*

85. R.S. 1985, c. 31 (4th Supp.).

86. *Lavigne v. Canada* (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773 at paragraph 21.

87. *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 at 386.

88. *Lavigne*, *supra* note 86, at paragraph 23.

89. *R. v. Beaulac*, [1999] 1 S.C.R. 768 at paragraph 20 (Bastarache, J.).

Manitoba Language Rights.⁹⁰ In this decision, the Court considered the legality of the laws of Manitoba, which since 1890 had been enacted almost exclusively in English only, despite the existence of an 1870 federal statute which required the province to publish its laws and regulations in both French and English.

The Court ruled that all the unilingual laws were invalid but suspended this declaration temporarily to avoid a legal vacuum. The decision recognized the pivotal place that language occupies in the lives of human beings:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.⁹¹

MULTICULTURALISM

Multicultural societies became common in the late twentieth and early twenty-first centuries.⁹² Nearly 95% of people in the world today live in multicultural states. Forty percent of these people live in federal states,⁹³ so Canada is hardly unique in that its population is made up of a wide range of ethnicities.

Federalism can be an attractive option to countries with multicultural societies since its combination of unity and diversity offers these states the possibility of having their cake and eating it too.⁹⁴ Federalism allows minorities to become majorities in sub-national units. It provides for the recognition and acceptance of different languages, religions, and cultures. Most of all, federalism embraces and promotes diversity, increasing its legitimacy in

90. [1985] 1 S.C.R. 721.

91. [1985] 1 S.C.R. 721 at 744.

92. CHERYL SAUNDERS, *Federalism, Decentralisation and Conflict Management in Multicultural Societies*, in Raoul Blindenbacher & Arnold Koller, eds., *FEDERALISM IN A CHANGING WORLD: LEARNING FROM EACH OTHER: SCIENTIFIC BACKGROUND, PROCEEDINGS AND PLENARY SPEECHES OF THE INTERNATIONAL CONFERENCE ON FEDERALISM 2002*, 33 (2002).

93. Thomas Fleiner, Walter Kälin, & Wolf Linder et al., *Federalism, Decentralisation and Conflict Management in Multicultural Societies*, in Blindenbacher et al., *FEDERALISM IN A CHANGING WORLD*, *supra* note 92, at 198.

94. Saunders, *supra* note 92, at 34.

the eyes of the entire population and not just of a dominant group.⁹⁵

Several countries have adopted federalism as a way to accommodate minority groups, including Switzerland (to accommodate the French and Italians), Belgium (to accommodate the Flemish), Spain (to accommodate the Catalans and the Basques) and, of course, Canada, which adopted federalism as a way to protect the rights of the Quebecois.⁹⁶

This is not to say that all federal systems were adopted as a response to cultural pluralism. In the United States, Australia, Germany, and Brazil, for example, the sub-national units do not correspond in any way with distinct cultural communities who wish to retain their self-government and cultural distinctiveness.⁹⁷ Federalism in those countries is not used as a way to protect the cultural integrity of a minority group, in the way that the Canadian province of Quebec protects the distinctiveness of the primarily Francophone Quebecois.⁹⁸

Diversity has been a fundamental characteristic of Canada since its beginnings. Canada's legislative framework, which was initially conceived to protect the interests of two cultures, has been expanded and strengthened in order to better reflect Canada's support of the growing cultural diversity of its citizens.⁹⁹ Respect for Canada's ethnic minorities is entrenched in the Constitution under Section Twenty-Seven of the Charter, which requires that the Constitution be interpreted in a way that preserves and enhances Canada's multicultural heritage.

In 1969, the *Official Languages Act*, which established English and French as the official languages of Canada, also included recommendations aimed at non-English and non-French groups, encouraging federal institutions and agencies to encourage cultural diversification within a bilingual framework. These recommendations, coupled with the changing social, cultural, economic, and

95. *Id.*

96. Will Kymlicka, *Secession: Federalism and Secession: At Home and Abroad*, 13 Can. J.L. & Juris. 207 at paragraph 12 (2000).

97. *Id.* at paragraph 13.

98. *Id.*

99. Government of Canada, Minister of State (Multiculturalism), Canadian Heritage, *The Canadian Multiculturalism Act - 15 years later*, http://www.canadianheritage.gc.ca/progs/multi/reports/ann2002-2003/01_e.cfm?nav=2Multi-culturalism-15-years-later].

political face of Canada, led to the announcement of the *Canadian Multiculturalism Policy* in 1971.¹⁰⁰

Addressing the House of Commons, the Right Honourable Pierre Elliot Trudeau, then Prime Minister of Canada, indicated his support for a "policy of multiculturalism within a bilingual framework" as the "most suitable means of assuring the cultural freedom of Canadians." "National unity, if it is to mean anything in the deeply personal sense," said Mr. Trudeau,

must be founded on confidence in one's own individual identity; out of this can grow respect for that of others and a willingness to share ideas, attitudes and assumptions. A vigorous policy of multiculturalism will help create this initial confidence. It can form the base of a society which is based on fair play for all.¹⁰¹

Mr. Trudeau committed the Canadian government to support the various cultures and ethnic groups that made up Canadian society and to encourage them "to share their cultural expression and values with other Canadians and so contribute to a richer life for us all." Emphasizing the need for government protection of minorities, Mr. Trudeau concluded:

We are free to be ourselves. But this cannot be left to chance. It must be fostered and pursued actively. If freedom of choice is in danger for some ethnic groups, it is in danger for all. It is the policy of this government to eliminate any such danger and to "safeguard" this freedom.

When the *Canadian Multiculturalism Act*¹⁰² was passed unanimously by the Parliament in 1988, it made Canada the first country in the world to pass a national multiculturalism law that clearly affirmed multiculturalism as a fundamental value.¹⁰³ Building on Section Twenty-Seven of the Charter, which calls for the Charter to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," the Act also drew its strength from the equality pro-

100. *Id.*

101. Right Honourable P.E. Trudeau, *House of Commons*, October 8, 1971 http://www.canadahistory.com/sections/documents/trudeau_-_on_multiculturalism.htm.

102. R.S., 1985, c. 24 (4th Supp.).

103. *Multiculturalism - 15 years later*, *supra* note 99.

visions in the *Citizenship Act*, the *Canadian Human Rights Act*, and the *Official Languages Act*. In addition, the *Canadian Multiculturalism Act* fully supported international human rights agreements.¹⁰⁴

Under the *Canadian Multiculturalism Act*, federal institutions are committed to carrying out their activities in a way that recognizes and promotes the understanding that multiculturalism is a reflection of the cultural and racial diversity of Canadian society and which acknowledges the freedom of all members of Canadian society to preserve, enhance, and share their cultural heritage.¹⁰⁵

The goal of Canada's multiculturalism policy is to enable the integration of minority Canadians while encouraging federal institutions to remove discriminatory barriers to employment, service delivery, and civic participation.¹⁰⁶

The Canadian federal system permits the balanced development of minority and majority that is essential to the existence of an actively multicultural society. As noted earlier, federalism can be described as a balance between self-rule and shared rule. Such a balance allows cultural communities, such as the province of Quebec, the opportunity to promote their culture within their territories.¹⁰⁷

Federalism offers Canada a constitutional mechanism which not only tolerates and promotes diversity but also enables diverse communities to participate in government.¹⁰⁸ Canada, as a multicultural state, has used federalism to derive maximum benefit from diversity, and to constitutionally implement the principle of unity in diversity. In this way, Canadian society as a whole can participate in the pursuit of universal values without sacrificing the specific values of its own cultural communities.¹⁰⁹

ABORIGINAL RIGHTS

Part II of the *Constitution Act, 1982* clearly stipulates that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed and that such rights are guaranteed equally to male and female persons. The "aboriginal

104. *Multiculturalism - 15 years later*, *supra* note 99.

105. *Canadian Multiculturalism Act*, s. 3(1)(a).

106. *Id.*

107. Fleiner, Kälin, Linder, et al., *supra* note 93, at 206.

108. *Id.*

109. *Id.* at 207.

peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

There is no one document in which the rights mentioned in Section 35(1) of the *Constitution Act, 1982* are enumerated. It has therefore been up to the courts to determine the content and extent of these rights.

In determining what constitutes aboriginal rights, the Supreme Court has emphasized the importance of recognizing that these rights are specific rights which are "held by aboriginal people because they are aboriginal,"¹¹⁰ distinguishing them from more general human rights to which every person is entitled. The Court stated that

the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.¹¹¹

In considering how to best define aboriginal rights in the 1996 case of *R. v. Van der Peet*,¹¹² the Court examined decisions from the United States and Australia before formulating the following general test: In order to be an aboriginal right protected by Section 35(1), the "activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."¹¹³

The Supreme Court also recognized that Section 35(1) of the *Constitution Act, 1982* "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."¹¹⁴ For this reason, the Court held that the words in Section 35(1) are to be accorded a "generous (and) liberal interpretation."¹¹⁵

110. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paragraph 20.

111. *Id.* at paragraph 30.

112. [1996] 2 S.C.R. 507.

113. *Van der Peet*, *supra* note 110, at paragraph 46.

114. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paragraph 53.

115. *Id.* at paragraph 56.

Despite an obligation to interpret the constitutional provision generously, the rights recognized and affirmed under Section 35(1) are nevertheless subject to reasonable limitations, in the same way as the rights and freedoms guaranteed by the Charter are limited by the application of Section One, as discussed earlier. But rather than being contained in a discrete section of the Constitution, the interpretation of the aboriginal rights, and the reasonable limitations on them, are derived from general principles of "constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself."¹¹⁶

There are four steps to determining if a right under Section 35(1) has been infringed:

First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified.¹¹⁷

Once it has been determined that the applicant was acting pursuant to a non-extinguished aboriginal right, the burden then shifts to the government to show that the limitation "constitutes legitimate regulation of a constitutional aboriginal right."¹¹⁸ The government must demonstrate that the objective of the legislation is "compelling and substantial."¹¹⁹ In addition to assessing the legislation in light of its objective, courts must also consider the "special trust relationship and the responsibility of the government vis-à-vis aboriginals."¹²⁰

The infringement must also meet the test of minimal impairment: If the legislative objective is valid, has the aboriginal right been affected only to the extent that is absolutely necessary? Other considerations are included in this step as well, such as whether adequate compensation has been offered, or whether the aboriginal people themselves were consulted.¹²¹

116. *Id.* at paragraph 55.

117. *R. v. Van der Peet*, *supra* note 110, at paragraph 2.

118. *Sparrow*, *supra* note 114, at paragraph 71.

119. *Id.* at paragraph 71.

120. *Id.* at paragraph 75.

121. *Id.* at paragraph 82.

In short, the recognition and affirmation of aboriginal rights protected under Section 35(1) "requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians."¹²²

ASYMMETRICAL FEDERALISM

Asymmetry in Canadian federalism means that in certain areas, especially those which have the most impact on local populations, such as health care and immigration, some provinces have the option of determining for themselves the best way to administer the resources received from the federal government.

For example, Section 94A of the *Constitution Act, 1867* gives the federal government jurisdiction over old age pensions but grants all provinces the ability to opt out. The province of Quebec exercised this option and has its own Quebec Pension Plan. The other provinces had the same opportunity but decided not to take advantage of it.¹²³ Asymmetry can also be found in the area of immigration, in which six provinces have their own specific agreements with the federal government, each one different from the others.

More recently, the federal government signed a health care accord with the provinces in which it recognized the specificity of Quebec society and respected its need to implement its own plan for renewing the provincial health system. In return, Quebec agreed to honor the goals of the overall health plan. This type of flexibility allows Canada to respond to changes in society and to maintain a responsive partnership between the provinces and the central government.

CONCLUSION

Given its large geographic size, the presence of two founding languages, and the diversity and distinctiveness of its regional cultures and economies, Canada required a system of government that could simultaneously promote both national and regional interests. Canadian federalism, originally adopted to accommodate two founding peoples, allows Canadian citizens to enjoy the advantages of both unity and diversity in a country that is now

122. *Id.* at paragraph 83.

123. Cameron D. Bodnar, *Practice and Principle: Asymmetrical Federalism in Canada*, at 6, <http://www.cpsa-acsp.ca/paper-2003/bodnar.pdf>.

called “home” by people from virtually every nation and culture on the planet.¹²⁴

Federalism has given Canada “the flexibility to adapt to changing times and circumstances, permitting us to develop into one of the most open, advanced, and prosperous nations in the world, with an exceptional quality of life.”¹²⁵

What started in 1867 as a creative solution to the problem of how to unite diverse groups that had distinct, and sometimes contrary, interests into one structure that could meet the constitutional and economic problems of the day has evolved into a federation that reflects the values and aspirations of Canadians across the country. Canada’s Constitution, which guarantees the fundamental rights and freedoms of the individual, not only expresses a profound respect for human rights but also explicitly promotes Canada’s commitment to its diverse cultural communities.

124. THE RIGHT HONOURABLE JEAN CHRÉTIEN, *Plenary speech* in Blindenbacher & Koller, *supra* note 92, at 592.

125. *Id.*

